National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: Septemer 30, 1997

TO: Mary Zelma Asseo, Regional Director, Region 24

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Pueblo International, Cases 24-CA-7633, 7665, 7679, 7694, 7695, 7696, 7712, and 7713, and Union de Empleados de los Supermercados Pueblo (Pueblo International), Cases 24-CB-1826, 1831, 1844, 1849, 1850, 1851, 1855, and 1856

530-6067-2060-3322, 530-6067-2070-6760, 536-2581-3370, 536-2581-3384, 536-2581-6767-8700

These cases were submitted for advice on whether the Union and Employer, by modifying a contract during its term, executed an overly broad waiver either of contractual rights, including employee claims under the grievance-arbitration clause of the extant collective bargaining agreement, or of individual rights under various federal and state laws.

FACTS

The Employer and the Union have a collective-bargaining agreement effective by its terms from March 7, 1996 through March 6, 1999, covering 6000 employees. Because of its worsening economic condition, the Company approached the Union for relief from some of the terms of its extant agreement. The parties met for the first time on January 2, 1997, where the Company informed the Union representatives that it was going to implement a general reduction in force for managerial employees on about January 12, and that subsequently there would be a reduction in force of approximately 150-200 hourly employees. A series of negotiations ensued wherein the parties discussed the criteria for this lay off, severance pay, and the continuation of health benefits for those employees laid off.

As a result of these negotiation and in exchange for severance pay and other benefits, including a payment in lieu of employer health care contributions, the Union executed a "Stipulation and General Release" where it acknowledged that the layoff was due to the Company's economic condition, and where it modified the criteria for lay off in the extant contract. The modified lay off procedure allowed, for this time only, that full time employees could be laid off before part-time employees, and further that this reduction in force would be accomplished by "strictly applying the classification and seniority factors within the geographical area" under Article XXIV of the collective bargaining agreement, but not applying items B(3) and B(4) of that Article, i.e., ability and skills and physical capacity to carry out work, respectively.

Pertinent to the issues here submitted, item FIFTH of the "Stipulation And General Release" provides:

FIFTH: The Parties agree that this agreement is extensive to all claims any employee may have or could have against Pueblo including the grievance procedure under Article XXIX of the collective bargaining agreement between the parties and through the present stipulation, they mutually release, relinquish and exonerate each other forever of any and whichever rights, cause of actions, claims or demands that each one has or may have in the future, under the Constitution or any law, or regulation or executive or federal order, of the Commonwealth of Puerto Rico or the United States of America and this release includes, but is not limited to, the following legal provisions:

(a) Title VII of the Federal [ ] Civil Rights Act of 1964 ...

(b) The Executive Order No. 11245, on Equal Employment Opportunities, as amended;

(c) Age Discrimination in Employment Act, as amended and the Older Workers Benefit Protection Act, 29 U.S.C.A. ...

(d) The Anti-discrimination Act of the Commonwealth of Puerto Rico (Law No. 100 of June 30, 1958), as amended, 29 L.P.R.A. sec. 185a and the following:

(f) (sic) Laws on Daily Work and Overtime (Law No. of May 15, 1948 and Law No. 223 of July 23, 1974 ...

(g) Minimum Wage Act of Puerto Rico and Employers Discrimination Act, Law No. 96 of June 26, 1956, and Law No. 114 of July 17, 1979 ...

(h) Federal Act for Persons with Disabilities of 1990, 42 U.S.C. sec. 12101 and the following, [ ] Law Prohibiting Discrimination against the Handicapped, Law No. 44 of July 2, 1985, 1 L.P.R.A. sec. 501 ...

(i) any claim protected by legislation, jurisprudence, judicial theories of a Torts nature and on doctrines concerning contractual obligations under the protection of which damages can be claimed, both by the employees as well as by third parties related to them, specifically, but without limiting thereupon, to claims under the protection of articles 1802 and 1803 of the Puerto Rico Civil Code, 31 L.P.R.A., sec. 5141 and 5142;

(j) Whichever other provisions of law, be they constitutional statutes, either federal, state or local, including any other applicable regulation, that may arise under the protection of actions or omissions that may have occurred during the employment period of the employees with Pueblo up to the date of this document.

Unit employees were laid off pursuant to the procedure as outlined in the "Stipulation" on January 24, 1997 and thereafter. Some employees allege that the procedure by which they have been selected for layoff is incorrect because employees with less seniority have been retained and because the work performed by these full-time employees is being performed by other less senior employees or by part-timers, among other reasons.

On June 26, 1997 the Union President notified the Employer that the laid-off employees had grievances concerning the implementation of the layoffs, and requested certain information to verify and investigate the grievances. The Employer provided the requested information, including Company seniority lists. On July 17, the Union sent a letter to several of the grievants, stating that the Union had determined that the Employer had correctly applied the criteria in the collective bargaining

agreement and, therefore, would not pursue the grievances. On August 21, in response to a request from the Region, the Employer's Counsel informed the Regional Office that it was not agreeable to deferral of these charges to grievance arbitration because the Union had determined that the employees' grievances had no merit.

ACTION

We conclude that the parties by their execution of the "Stipulation" did not execute an overly broad waiver of contractual rights under the extant collective bargaining agreement and, to the extent the charges allege such a violation, they should be dismissed, absent withdrawal.[(1)] Moreover, to the extent that item FIFTH purports to be an all-inclusive waiver of individual employee rights under any laws of the United States or Puerto Rico including, but not limited to, all of the statutes and laws enumerated, as well as the NLRA by implication, such waivers encompass a nonmandatory subject of bargaining.[(2)] We would not argue that the parties' agreement to such permissive waivers during collective bargaining is per se unlawful.

While parties to an existing collective-bargaining agreement have no obligation to renegotiate a contract during its term, they may agree to do so, particularly where as here the Employer has demonstrated an economic need to do so.[(3)] A union would violate its duty of fair representation by negotiating such a modification only if the result was so far outside the "wide range of reasonableness" that it is wholly "irrational" or "arbitrary."[(4)] Where, as here, the Union has agreed in the "Stipulation" that this layoff was dictated by economic necessity, and where all the evidence is consistent with that necessity, we cannot argue that the Union by executing this "Stipulation" has violated its duty of fair representation or that it has unlawfully waived either the employees' contractual or Section 7 rights. Thus, the deal struck by the Union here, i.e., modification of the seniority criteria in its contract with the Employer to allow for the lay off of approximately 200 full-time workers in return for a

severance package and other benefits, does not appear to be "irrational" or "arbitrary" in light of the recognized economic necessity.(5)

We also reject the argument that the parties by this agreement have accomplished an unlawful waiver of individual Section 7 rights under NLRB v. Magnavox Company of Tennessee, 415 U.S. 322 (1974). Magnavox and its progeny stand only for the proposition that a union may not waive its members rights with regard to choosing a bargaining representative and/or other related Section 7 rights. Magnavox does allow a union to waive its members economic rights, i.e., contractual benefits.(6) Here, the "Stipulation" surrendered some contractual benefits in return for obtaining a severance package and other benefits for those members who are laid off, without effecting its members' Section 7 rights protected by Magnavox. We note in this regard that there is no evidence of any Union waiver concerning any Employer rule which would prohibit employee discussion of a layoff made pursuant this "Stipulation."(7) Thus, Magnavox is inapposite.

In addition, the parties attempted, through the broad release and waiver language of item FIFTH, to "release relinquish and exonerate each other" from "rights, causes of actions, claims, or demands" of individual employees under the universe of federal and state laws, both those enumerated in subparagraphs (a) to (j), as well as those not enumerated but whose waiver is implied. We note first that this provision does not amount to a wholesale attempt to waive all employee access to any federal or state forum in which they may seek redress for any prospective employment related problem. Rather, this section is most reasonably read narrowly as an attempt to waive employee rights with regard to employment related causes of action which emanate from a layoff pursuant to the "Stipulation."(8)

This reasonably narrow reading makes these waivers permissive subjects of bargaining.(9) It does not appear that the Charging Party is attacking the facial legality of these waivers. Rather, the instant allegations concern these waivers only as they are included with the Union's agreement to waive the extant contractual layoff procedure and substitute the new procedure contained in the "Stipulation." We conclude that the parties' attaching of these waivers to their otherwise lawful modification of their bargaining agreement does not make that modification unlawful.(10) Accordingly, the Region should dismiss these allegations, absent withdrawal.

B.J.K.

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[1] It is unclear whether the Region believes that the "Stipulation" contains a general waiver of the grievance-arbitration term of the still extant collective-bargaining agreement, or whether the Region believes that the term "waiver" means the parties have waived the employees' rights to grieve their layoffs based on the seniority provisions as described in the extant contract before the modification was executed. To extent the Region believes the latter, the following analysis is applicable. To the extent it believes the former, there is no evidence that the parties have waived the grievance-arbitration provisions of the contract. Indeed, while the Union has found no merit in the employees grievances, the parties have in fact processed the grievances.

[2] Compare Reichhold Chemicals, Inc., 288 NLRB 69, 72 at note 19 (1988) with Coca Cola Bottling Co. of Los Angeles, 243 NLRB 501 (1979).

[3] See, e.g., Graphic Communications Local 554, 306 NLRB 844, 851 (1992), enfd. 991 F.2d 1302 (7th Cir. 1993).

[4] Ohio Valley Hospital and Ohio Nurses Association, 324 No. 6, slip op. at 3 (1997), quoting from Air Line Pilots v. O'Neill, 499 U.S. 65, 78 (1991).

[5] Cf. Air Line Pilots v. O'Neill, 499 U.S. at 78-82 (union did not breach its duty of fair representation by negotiating a strike settlement agreement which provided for reallocation of positions covered by seniority-based bid system between striking and working pilots); Crown Zellerbach Corp., 266 NLRB 1231 (1983) (union did not breach duty of fair representation by negotiating agreement providing for bonus pay, notwithstanding fact that agreement negatively impacted employees who either did not cross the picket line or who remained on preferential hiring list.); Western Conference of Teamsters, 251 NLRB 331, 338-340 (1980) (union did not breach duty of fair representation by misrepresenting terms of an agreement to employees at ratification meeting, notwithstanding that it did not adequately explain all of the agreements details, including that employees were foregoing a raise, where Union did not intentionally or willfully mislead members.)

[6] See NLRB v. Magnavox , 415 U.S. at 325, See also Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705-706 (1983) (quoting NLRB v. Magnavox Co., 415 U.S. at 325).

[7] Cf. Universal Fuels, 298 NLRB 254 (1990).

[8] This construction is consistent with the parties' treatment of the instant charges, i.e., they have not raised the instant waivers as a defense.

[9] **See note 2, supra.**

[10] **Cf. Local 1367, International Longshoremen's Association, 148 NLRB 897, 899 (1964) (maintenance and enforcement of racially based contract term unlawful: "the statute does not sanction the execution of agreements which are unlawful. Because collective-bargaining agreements which discriminate invidiously are not lawful under the Act, the good-faith requirements of Section 8(d) necessarily protect employees from infringement of their rights; both unions and employers are enjoined by the Act from entering into contractual terms which offend such rights.")**